Vienna, 4 February 2020

**Note: Subsidies to Coal Electricity Production under State Aid Scrutiny**

I. **Analysis of Subsidies published by Secretariat**

After publishing a draft in March 2019, the Energy Community Secretariat published an “Analysis of Direct and Selected Hidden Subsidies to Coal Electricity Production in the Energy Community Contracting Parties” in June 2019 (hereinafter “the Study”). The Study analyses the amount of direct and hidden subsidies to support the coal sector and shows the impact of these subsidies on the profitability of thermal power plants and the price of electricity to supply households and industry. It focuses on the period 2015-2017 and covers Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia, Serbia and Ukraine.

The Study deals with two sets of subsidies:

(i) Direct subsidies which is based on the definition of subsidies provided by Article 1 of the WTO Agreement on Subsidies and Countervailing Measures (“any financial contribution by a government, or agent of a government, that confers a benefit on its recipients”). These subsidies are classified in three categories:

- fiscal-type subsidies (e.g. direct funding from state budget and subsidies derived from the writing-off and reprogramming of arrears to the budgets and public funds, government loans, debt write-offs or repayment of loans from the state budget on the basis of issued loan guarantees, lowering of the fees payable to the state for used resources and VAT exemption);
- public finance support subsidies (e.g. provision of state guarantees for foreign investment loans, loans extended by government-controlled institutions and loans and grants provided by international organisations to business entities involved in electricity generation from coal);
- and State Owned Enterprises (SOE) investment support subsidies (e.g. direct investment of state enterprises in capital, regular advances on production, extending loans and tolerance for non-payment of electricity bills by entities in the coal production sector).

(ii) Hidden subsidies are defined as exemption or waiver of otherwise reasonable costs of power producers, due to their status and legal framework, providing to it a competitive advantage in the respective market which is not obvious, such as operation at a low or negative level of profitability and non-payment of CO2 emissions or any other externalities.
II. State aid scrutiny

As has been pointed out above, the Study focuses on the analysis of so-called subsidies as defined by the WTO and their impact on the profitability of plants and the electricity price. It explicitly states that it does not assess whether these measures constitute State aid in the sense of Article 18 of the Energy Community Treaty and whether such measures are compatible.

Therefore, in the following, the Secretariat provides a preliminary assessment of the direct subsidies identified by the Study (as listed in Annex 1 of the draft report of March 2019 “Overview of Direct Subsidies per Contracting Party and Type of Subsidies”) under the State aid acquis. The aim of this analysis is to identify specific potential State aid measures in each Contracting Party and refer them for further assessment to the competent national State aid authority. The Secretariat remains open for cooperation and assistance in the framework of Article 2 of the Dispute Settlement Procedures when assessing these measures in further detail.

Article 18(1)(c) of the Treaty provides that any public aid which distorts or threatens to distort competition by favouring certain undertakings or certain energy resources shall be incompatible with the proper functioning of the Treaty, insofar as it may affect trade of Network Energy between the Contracting Parties. Article 19 of the Treaty explicitly provides for an obligation of the Contracting Parties to ensure that with regard to public undertakings and undertakings, to which special or exclusive rights have been granted, the principles of the Treaty, including the rules on State aid, are upheld. The elements of the definition of State aid are the following:

i. there must be a benefit or advantage;
ii. which is granted by the State or through State resources;
iii. which favours certain undertakings or certain energy resources (selectivity);
iv. which is liable to distort competition and may affect trade between Member States (in the case of the Energy Community, trade of Network Energy between the Contracting Parties).

Support measures which fall under this definition of State aid are generally prohibited. However, Article 107(2) and (3) TFEU (which corresponds to Article 87 of the EC Treaty, as enshrined in Annex III to the Energy Community Treaty) provide for limited grounds of compatibility of such aid. The assessment and decision on compatibility or non-compatibility is within the competence of the national State aid authority. However, in this context, only Article 107(3)(c) and (e) constitute potential grounds for compatibility. While on the basis of Article 107(3)(e) TFEU, according to Council Decision 2010/787/EU on State aid to facilitate the closure of uncompetitive coal mines, only aid to alleviate the social and regional consequences of the closure of coal mines is permitted, the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (“EEAG”) specify grounds of compatibility under Article 107(3)(c) TFEU. However, compatibility of State aid to coal needs to be assessed on a case-by-case basis by the competent State aid authority and can only be accepted under limited circumstances.

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1 See Article 18(1)(c) of the Treaty or Article 107 TFEU.
III. Specific measures

A. Bosnia and Herzegovina

(a) Failure to collect tax, social security contribution and VAT arrears

The failure by the FBiH to collect tax and social security contribution arrears and by BiH to collect VAT arrears from State coal mines potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage. This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.

As reported by the Study on the basis of official data provided by the Tax Administration, the FBiH and BiH fail to collect tax, social security contribution and VAT arrears. Tax, social security contribution and VAT constitute charges normally included in the budget of an undertaking. In fact, in this case, the state coal mines are effectively required to pay these charges, but the obligation is not enforced and, therefore, they are released from the duty to pay the arrears. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State. In the case at hand, the decision not to collect the arrears must be taken by the authority responsible for the collection which is the Tax Administration of FBiH and of BiH. These authorities are part of the State’s administration and their measures are therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources. For example, as in the case at hand, a ‘shortfall’ in tax and social security revenue due

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2 Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.
4 Commission Notice on the notion of State aid (2016/C 262/1) para 59.
5 Commission Notice on the notion of State aid (2016/C 262/1) para 51.
to exemptions or reductions in taxes or social security contributions granted by the State fulfils the State resources requirement.\(^7\)

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.\(^8\) There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear,\(^9\) but in the case at hand, the exemption is an *ad hoc* measure benefitting the State coal mines, which has a selective character by reserving favourable treatment for these undertakings.\(^10\)

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.\(^11\) A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.\(^12\) The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.\(^13\) Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.\(^14\) As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Waiver of fee for exploitation of natural resources

In 2018, the Law on Charges for Exploitation of Natural Resources for Electricity Generation of the RS which required the producers of electricity from coal in RS to pay a fee of EUR 0,0031/kWh of generated electricity was amended and lowered the fee to EUR 0,0015/kWh.\(^15\) The lowering of the

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\(^9\) Commission Notice on the notion of State aid (2016/C 262/1) para 126.


\(^12\) Commission Notice on the notion of State aid (2016/C 262/1) para 190; *Cases C-518/13, Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 65; *C-197/11 and C-203/11, Libert and others*, ECLI:EU:C:2013:288, para 76.


fee potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.\(^\text{16}\)

The lowering of a fee for the use of resources constitutes such an advantage in so far as the use of resources should normally be remunerated by an appropriate fee. Lowering this fee or applying a discount to this fee alleviates the burden normally borne by an undertaking.

(ii) Imputability to the State and State resources

The advantage is derived from amendments to a law. Since legislative power is one of the constitutional powers of a State, an aid resulting from legislative measures is necessarily imputable to the State.\(^\text{17}\)

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.\(^\text{18}\) Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.\(^\text{19}\) Since the fee for using the resources forms part of the State’s income, it is considered State resources.

(iii) Selectivity

A measure is selective if it generates an advantage exclusively for certain undertakings or certain energy sources.\(^\text{20}\)

In the case at hand, the measure is selective if the fee applies to all electricity generators and is only lowered for generators of electricity from coal. This would constitute a selective advantage for generators of electricity from coal compared to all other electricity generators.

(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

\(^{16}\) Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.


\(^{18}\) Commission Notice on the notion of State aid (2016/C 262/1) para 51.


As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(c) Government guarantee for loan for Flue Gas Desulphurisation Construction at Ugljevik TPP

The project is financed by a loan from the Japanese government (Japanese International Cooperation Agency)\(^{21}\) for 30 years at an interest rate of 0.55% to MH EPS. The public guarantee covering this loan potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.\(^{22}\) In the same way as any other transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms.\(^{23}\) Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter.\(^{24}\) This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.\(^{25}\)

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.\(^{26}\) The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.\(^{27}\)

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy.\(^{28}\) In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given

\(^{23}\) Commission Notice on the notion of State aid (2016/C 262/1) para 108.
\(^{24}\) Commission Notice on the notion of State aid (2016/C 262/1) para 110; Case C-559/12 P, France v Commission, ECLI:EU:C:2014:217, para 96.
\(^{26}\) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.
\(^{27}\) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.
\(^{28}\) Case C-482/99, France v Commission (Stardust), ECLI:EU:C:2002:294.
guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:29

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).
- A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.30 The guarantee at stake is given by the government (i.e. the Ministry of Finance) and are therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of State resources.31 The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient.32 Therefore, the guarantee at issue involves State resources.

(iii) Selectivity

When States adopt ad hoc positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.33

The guarantee at issue is granted in favour of one TPP, i.e. it guarantees performance and payment of specific obligations of the operator. The operator benefits from the guarantee insofar as it allows

29 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 3.1.
32 Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, Ecotrade, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, Bouygues and Bouygues Télécom v Commission and Others, ECLI:EU:C:2013:175, para 137, 138 and 139.
33 Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, Commission v MOL, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, Deutsche Lufthansa, ECLI:EU:C:2013:442, para 52.
it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantee favours a specific undertaking.

(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(d) Investment in coal mines capital

The investment by JP EPBiH d.d. into capital of seven coal mines in FBiH potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

In order to determine whether direct investment of equity or debt capital confers an advantage, the private investor test is applied.\(^{34}\) In short, State aid is present when an enterprise receives fresh capital under circumstances that would not have been acceptable to a private investor operating under normal market economy conditions. It therefore must be assessed whether the beneficiary enterprise could have raised the same amount of capital on the same terms in the private capital markets. In considering this question, it is necessary to consider whether under similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount.\(^^{35}\) If an injection of capital disregards any prospect of profitability, even in the long term, it is liable to be considered State aid.\(^^{36}\) The assessment whether a private investor would have entered into the transaction on the same terms will vary from case to case and needs to take into account all factors that are relevant to the transaction and its context. This includes the situation of the beneficiary undertaking and the relevant market, the liquidity of the capital, a comparison between the internal rate of return on the investment and the minimum acceptable rate for a private investor.

(ii) Imputability to the State and State resources

The investment is undertaken by JP EPBiH d.d., a company of which 90.369% are owned by the Federation of Bosnia and Herzegovina, while 9.631% are owned by private investment funds and small individual shareholders. The resources of States or of their dependent or independent, national, regional or local public institutions (“public authorities”) as well as the resources of undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence

\(^{35}\) ECJ C-305/89 Alfa Romeo, ECR 1991 I-1603, para. 19.
\(^{36}\) ECJ C-303/88 ENI-Larossi, ECR 1991 I-1433, para. 22.
(“public undertakings”), are to be seen as State resources.\textsuperscript{37} Since the State is capable of directing the use of the company’s resources, they are under the control of the State\textsuperscript{38} and can be considered State resources.\textsuperscript{39}

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.\textsuperscript{40} There is no need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question; the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken.\textsuperscript{41} Possible indicators include for example:\textsuperscript{42}

- The fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;
- The fact that the undertaking through which the aid was granted had to take account of directives issued by governmental bodies;\textsuperscript{43}
- The integration of the public undertaking into the structures of the public administration;
- The degree of supervision that the public authorities exercise over the management of the undertaking;
- Any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

(iii) Selectivity

When States adopt \textit{ad hoc} positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.\textsuperscript{44}

In the case at hand, investment occurs into seven coal mines, which has a selective character by reserving favourable treatment for these undertakings.\textsuperscript{45}
(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(e) Short-term loans for coal mines

Granting of short-time loans by JP EPBiH d.d. to seven coal mines in FBiH potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

The State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid. It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount and under the same conditions. The assessment whether a private investor would have entered into the transaction on the same terms will vary from case to case and needs to take into account all factors that are relevant to the transaction and its context. This includes the situation of the beneficiary undertaking and the relevant market, the liquidity of the capital, a comparison between the internal rate of return on the investment and the minimum acceptable rate for a private investor.

(ii) Imputability to the State and State resources

The loans are granted by JP EPBiH d.d., a company of which 90.369% are owned by the Federation of Bosnia and Herzegovina, while 9.631% are owned by private investment funds and small individual shareholders. Since the State is capable of directing the use of the company’s resources, they are under the control of the State and can be considered State resources.

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.\(^{51}\)

In the case at hand, loans are given to seven coal mines, which has a selective character by reserving favourable treatment for these undertakings.\(^{52}\)

(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(f) Interest-free advance payments

Granting of interest-free financing, i.e. advance payment by JP EPBiH d.d. to seven coal mines in FBiH potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

Advance payments by buyer effectively constitute short-term interest free loans to the seller.

As has been pointed out above, the State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.\(^{53}\) It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount and under the same conditions.\(^{54}\) Interest-free loans confer an advantage on the beneficiary.\(^{55}\)

(ii) Imputability to the State and State resources

The advantage is granted by JP EPBiH d.d., a company of which 90.369% are owned by the Federation of Bosnia and Herzegovina, while 9.631% are owned by private investment funds and

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\(^{52}\) Commission Notice on the notion of State aid (2016/C 262/1) para 126.


small individual shareholders. Since the State is capable of directing the use of the company’s resources, they are under the control of the State\textsuperscript{56} and can be considered State resources.\textsuperscript{57}

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.\textsuperscript{58}

(iii) Selectivity

When States adopt \textit{ad hoc} positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.\textsuperscript{59}

In the case at hand, the advantage is granted to seven coal mines, which has a selective character by reserving favourable treatment for these undertakings.\textsuperscript{60}

(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.


\textsuperscript{60} Commission Notice on the notion of State aid (2016/C 262/1) para 126.
B. Kosovo*

(a) Support for operational costs of KEK

Support for operational costs of KEK from the State budget potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.\(^{61}\) Direct support of the operational costs of a company without any obligation to pay it back, pay interest or similar would clearly not be provided by the market and therefore constitutes an advantage.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.\(^ {62}\) The support at stake is given by the government (i.e. the Ministry of Finance) and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The measure at stake constitutes a direct transfer of resources from the State budget and therefore contains State resources.

(iii) Selectivity

When States adopt ad hoc positive measures benefiting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.\(^ {63}\)

In the case at hand, support is granted to KEK only and is therefore selective.

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with


\(^{62}\) Commission Notice on the notion of State aid (2016/C 262/1) para 39.

\(^{63}\) Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, Commission v MOL, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, Deutsche Lufthansa, ECLI:EU:C:2013:442, para 52.
which it competes.\textsuperscript{64} A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.\textsuperscript{65} KEK is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.\textsuperscript{66} Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.\textsuperscript{67} As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Governmental loan to KEK

The loan of EUR 191.952 mn (interest rate 2.5% over 18 years) by the Government to KEK potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.

(i) Advantage

The State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.\textsuperscript{68} It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided a loan under the same conditions.\textsuperscript{69} Interest-free loans,\textsuperscript{70} loans on preferential interest terms\textsuperscript{71} or without sufficient security\textsuperscript{72} have been categorized as State aid.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.\textsuperscript{73} The loan at issue is granted by the Government, i.e. the Ministry of Finance, and is therefore imputable to the State.


\textsuperscript{66} Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, Eventech v The Parking Adjudicator, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, Libert and others, ECLI:EU:C:2013:288, para 76.

\textsuperscript{67} ECJ C-518/13, Eventech, ECLI:EU:C:2015:9, para 65.

\textsuperscript{68} ECJ 67, 68 and 70/85, Van der Kooy [1988] ECR 219, p. 251.


\textsuperscript{72} C-457/00, Belgium/Commission [2002] ECR I-6931.

\textsuperscript{73} Commission Notice on the notion of State aid (2016/C 262/1) para 39.
Only advantages granted directly or indirectly through State resources can constitute State aid. The measure at stake constitutes a direct transfer of resources from the State budget and therefore contains State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.\(^{74}\)

In the case at hand, support is granted to KEK only and is therefore selective.

(iv) Distortion of competition and effect on trade

KEK is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(c) Forgiven accrued interest on governmental loans

The State waiving interest on governmental loans that is due to be paid by KEK potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.

(i) Advantage

As has been pointed out above, the State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.\(^{75}\) Interest-free loans confer an advantage on the beneficiary.\(^{76}\) Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.\(^{77}\) This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.\(^{78}\)

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\(^{77}\) Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State. The support at issue is granted by the Government, i.e. the Ministry of Finance, and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The interest on governmental loans is due to the State budget; therefore the measure at stake constitutes a transfer of resources from the State budget and therefore contains State resources.

(iii) Selectivity

When States adopt ad hoc positive measures benefitting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.

In the case at hand, support is granted to KEK only and is therefore selective.

(iv) Distortion of competition and effect on trade

KEK is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(d) State guarantee for loan to Energy Cleanup and Land Reclamation Project

The State guarantee provided by the Ministry of Finance for a loan by the International Development Agency/World Bank (at an interest rate of 2% over 20 years) to KEK for the Energy Cleanup and Land Reclamation Project potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention. In the same way as any other

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80 Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, Commission v MOL, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, Deutsche Lufthansa, ECLI:EU:C:2013:442, para 52.
81 Commission Notice on the notion of State aid (2016/C 262/1) para 60; C-342/96, Spain v Commission, ECLI:EU:C:1999:210, para 41.
transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms. Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter. This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy. In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).
- A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

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63 Commission Notice on the notion of State aid (2016/C 262/1) para 110; Case C-559/12 P, France v Commission, ECLI:EU:C:2014:217, para 96.
65 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.
(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State. The guarantee at stake is given by the government (i.e. the Ministry of Finance) and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of State resources. The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient. Therefore, the guarantee at issue involves State resources.

(iii) Selectivity

When States adopt ad hoc positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.

The guarantee at issue is granted in favour of KEK, i.e. it guarantees performance and payment of specific obligations of KEK. KEK benefit from the guarantee insofar as it allows it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantee favours specific undertakings.

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes. A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. KEK is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

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91 Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, Ecoretrade, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, Bouygues and Bouygues Télécom v Commission and Others, ECLI:EU:C:2013:175, para 137, 138 and 139.
92 Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, Commission v MOL, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-384/12, Deutsche Lufthansa, ECLI:EU:C:2013:442, para 52.
It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.\(^\text{95}\) Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.\(^\text{96}\) As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

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\(^{95}\) Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, \textit{Eventech v The Parking Adjudicator}, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, \textit{Libert and others}, ECLI:EU:C:2013:288, para 76.

\(^{96}\) ECJ C-518/13, \textit{Eventech}, ECLI:EU:C:2015:9, para 65.
C. Montenegro

(a) Failure to collect tax and social contribution arrears

The failure of Montenegro to collect tax and social security contribution arrears from Pljevlja coal mine, but to reprogramme them with 2017 as starting date, potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.97

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.98 This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.99

As reported by the Study, the tax administration of Montenegro fails to collect tax and social security contribution arrears, but reprogrammed them to start in 2017. Tax and social security contributions constitute charges normally included in the budget of an undertaking. In the case at hand, Pljevlja is effectively required to pay these charges, but at a later date, which in essence constitutes an interest-free loan for the time of postponement. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.100 In the case at hand, the decision not to collect the arrears must be taken by the authority responsible for the collection which is the Tax Administration of Montenegro and/or the Ministry of Finance. These authorities are part of the State’s administration and their measures are therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.101 Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.102 For example, as in the case at hand, a ‘shortfall’ in tax and social security revenue due to exemptions or postponement in taxes or social security contributions granted by the State fulfils the State resources requirement.103

98 Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.
100 Commission Notice on the notion of State aid (2016/C 262/1) para 39.
101 Commission Notice on the notion of State aid (2016/C 262/1) para 51.
103 ECJ C-387/92, Banko Exterior de Espana, ECLI:EU:C:1994:100, para 14.
(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.\(^{104}\) There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear,\(^{105}\) but in the case at hand, the measure benefits Pljevlja, one coal mine, which has a selective character by reserving favourable treatment for this undertaking.\(^{106}\)

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.\(^{107}\) A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.\(^{108}\) The coal mine benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.\(^{109}\) Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.\(^{110}\) As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Governmental guarantee for KfW loan for filter replacement

The governmental guarantee issued by the Ministry of Finance for a loan by KfW to EPCG for EUR 10 mn for filter replacement at TPP Pljevlja\(^{111}\) potentially constitutes State aid and should be scrutinized by the national State aid authority, the Agency for Competition Protection.

\(^{104}\) ECJ C-15/14 P, MOL, ECLI:EU:C:2015:362 para 60.
\(^{105}\) Commission Notice on the notion of State aid (2016/C 262/1) para 127.
\(^{106}\) Commission Notice on the notion of State aid (2016/C 262/1) para 126.
\(^{109}\) Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, Evnetech v The Parking Adjudicator, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, Libert and others, ECLI:EU:C:2013:288, para 76.
\(^{110}\) ECJ C-518/13, Evnetech, ECLI:EU:C:2015:9, para 65.
(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.\(^{112}\) In the same way as any other transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms.\(^{113}\) Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter.\(^{114}\) This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.\(^{115}\)

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.\(^{116}\) The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.\(^{117}\)

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy.\(^{118}\) In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:\(^{119}\)

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).

\(^{113}\) Commission Notice on the notion of State aid (2016/C 262/1) para 108.
\(^{114}\) Commission Notice on the notion of State aid (2016/C 262/1) para 110; Case C-559/12 P, France v Commission, ECLI:EU:C:2014:217, para 96.
\(^{116}\) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.
\(^{117}\) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.
\(^{118}\) Case C-482/99, France v Commission (Stardust), ECLI:EU:C:2002:294.
\(^{119}\) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 3.1.
• A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.\textsuperscript{120} The guarantee at stake is given by the government (i.e. the Ministry of Finance) and are therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of State resources.\textsuperscript{121} The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient.\textsuperscript{122} Therefore, the guarantee at issue involves State resources.

(iii) Selectivity

When States adopt \textit{ad hoc} positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.\textsuperscript{123}

The guarantee at issue is granted in favour of one TPP, i.e. it guarantees performance and payment of specific obligations of the operator. The operator benefits from the guarantee insofar as it allows it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantee favours a specific undertaking.

(iv) Distortion of competition and effect on trade

The TPP benefitting from this measure is active in the generation of electricity, a market which is open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

\textsuperscript{120} Commission Notice on the notion of State aid (2016/C 262/1) para 39.

\textsuperscript{121} Commission Notice on the notion of State aid (2016/C 262/1) para 51; Case C-83/98 P, France v Ladbroke Racing Ltd and Commission, ECLI:EU:C:2000:248, para 48-51.

\textsuperscript{122} Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, Ecotrade, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, Bouygues and Bouygues Télécim v Commission and Others, ECLI:EU:C:2013:175, para 137, 138 and 139.

\textsuperscript{123} Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, Commission v MOL, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, Deutsche Lufthansa, ECLI:EU:C:2013:442, para 52.
(c) Electricity debt of Pljevlja

EPCG not claiming and enforcing any debts for electricity provided to the Pljevlja coal mine potentially constitutes State aid and should be scrutinized by the national State aid authority, the Agency for Competition Protection.

(i) Advantage

As has been pointed out above, not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.\(^{124}\)

Paying for products delivered and services rendered constitutes charges normally included in the budget of an undertaking. In the case at hand, Pljevlja is owing remuneration for the electricity provided to it by EPCG, but this obligation is not enforced, which in essence constitutes provision of electricity for free. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

The resources of States or of their dependent or independent, national, regional or local public institutions (“public authorities”) as well as the resources of undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence (“public undertakings”), are to be seen as State resources.\(^{125}\) Since the State is capable of directing the use of the company’s resources, they are under the control of the State\(^{126}\) and can be considered State resources.

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.\(^{128}\) There is no need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question; the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken.\(^{129}\) Possible indicators include for example:\(^{130}\)

- The fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;

\(^{124}\) Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.


\(^{129}\) Commission Notice on the notion of State aid (2016/C 262/1) para 41 et seq.

\(^{130}\) ECJ C-482/99, Stardust, ECLI:EU:C:2002:294 para 55 et seq.
The fact that the undertaking through which the aid was granted had to take account of directives issued by governmental bodies; \(^{131}\)

- The integration of the public undertaking into the structures of the public administration;
- The degree of supervision that the public authorities exercise over the management of the undertaking;
- Any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective. \(^{132}\) There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear, \(^{133}\) but in the case at hand, the measure benefits Pljevlja, one coal mine, which has a selective character by reserving favourable treatment for this undertaking. \(^{134}\)

(iv) Distortion of competition and effect on trade

The coal mine benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

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\(^{131}\) ECJ C-242/13, Commerz Nederland, ECLI:EU:C:2014:2224, para 35.
\(^{132}\) ECJ C-15/14 P, MOL, ECLI:EU:C:2015:362 para 60.
\(^{133}\) Commission Notice on the notion of State aid (2016/C 262/1) para 127.
\(^{134}\) Commission Notice on the notion of State aid (2016/C 262/1) para 126.
The measures identified by the Study are all guarantees provided by the State, i.e. the Ministry of Finance, for loans granted by either Deutsche Bank or Stopanska banka to ELEM, Elektrani na Makedonija, the state-owned electricity producer, for the modernization of TPP Bitola and its boiler units as well as delivery, construction and putting into operation of the main conveyor belt system from Brod Geotino to Suvodol.

The guarantees potentially constitute State aid and should be scrutinized by the national State aid authority, the Commission for Protection of Competition.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.\textsuperscript{135} In the same way as any other transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms.\textsuperscript{136} Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter.\textsuperscript{137} This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.\textsuperscript{138}

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.\textsuperscript{139} The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.\textsuperscript{140}

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy.\textsuperscript{141} In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a...
given guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).
- A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such

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142 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 3.1.
143 Commission Notice on the notion of State aid (2016/C 262/1) para 39.
145 Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, Ecotrade, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, Bouygues and Bouygues Télécom v Commission and Others, ECLI:EU:C:2013:175, para 137, 138 and 139.
measures have a selective character, as they reserve favourable treatment for one or a few undertakings.\(^{146}\)

The guarantees at issue are granted in favour of ELEM, i.e. it guarantees performance and payment of specific obligations of ELEM. ELEM benefits from the guarantees insofar as they allow it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantees favour a specific undertaking.

**(iv) Distortion of competition and effect on trade**

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.\(^{147}\) A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.\(^{148}\) ELEM is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.\(^{149}\) Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.\(^{150}\) As there is substantial cross-border trade in electricity, the guarantees are also capable of affecting trade in Network Energy between the Contracting Parties.


\(^{149}\) Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, *Libert and others*, ECLI:EU:C:2013:288, para 76.

E. Serbia

(a) Direct grants for coal mines and filters

Direct grants from the State’s budget to underground coal mines of JP PEU Resavica and to TPP Nikola Tesla (TENT) of JP EPS Belgrade (for filters) potentially constitute State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention. Direct support of the operational costs of a company without any obligation to pay it back, pay interest or similar would clearly not be provided by the market and therefore constitutes an advantage.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State. The support at stake is given by the government and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The measure at stake constitutes a direct transfer of resources from the State budget and therefore contains State resources.

(iii) Selectivity

When States adopt ad hoc positive measures benefiting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.

In the case at hand, support is granted to JP PEU Resavica and to TPP Nikola Tesla (TENT) of JP EPS Belgrade only and is therefore selective.

151 http://www.jppeu.rs/informator.html
155 Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, Commission v MOL, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, Deutsche Lufthansa, ECLI:EU:C:2013:442, para 52.
(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes. \(^{156}\) A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. \(^{157}\) JP PEU Resavica and to TPP Nikola Tesla (TENT) of JP EPS Belgrade are active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade. \(^{158}\) Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid. \(^{159}\) As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Failure to collect tax, social security contribution and VAT arrears

The failure by Serbia to collect tax and social security contribution arrears as well as other public revenues from JP PEU Resavica\(^{160}\) or to reprogramme them\(^{161}\) potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage. \(^{162}\) This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them. \(^{163}\)

Tax, social security contribution and public expenditures constitute charges normally included in the budget of an undertaking. In fact, in this case, JP PEU Resavica may be required to pay these charges, but the obligation is not enforced and, therefore, it is released from the duty to pay the...
arrears. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.\(^{164}\) In the case at hand, the decision not to collect the arrears must be taken by the authority responsible for the collection which is the tax administration. It is part of the State’s administration and its measures are therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.\(^{165}\) Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.\(^{166}\) For example, as in the case at hand, a ‘shortfall’ in tax, social security and other public revenue due granted by the State fulfils the State resources requirement.\(^{167}\)

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.\(^{168}\) There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear,\(^{169}\) but in the case at hand, the exemption is an \emph{ad hoc} measure benefitting JP PEU Resavica, which has a selective character by reserving favourable treatment for this undertaking.\(^{170}\)

(iv) Distortion of competition and effect on trade

JP PEU Resavica benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

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\(^{164}\) Commission Notice on the notion of State aid (2016/C 262/1) para 39.
\(^{165}\) Commission Notice on the notion of State aid (2016/C 262/1) para 51.
\(^{169}\) Commission Notice on the notion of State aid (2016/C 262/1) para 127.
\(^{170}\) Commission Notice on the notion of State aid (2016/C 262/1) para 126.
(c) Debt write-off

Partial write-off of a governmental loan granted by the government to JP EPS Belgrade\textsuperscript{171} potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.\textsuperscript{172} This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.\textsuperscript{173}

Although a loan by the government may be granted on market terms and therefore not confer any advantage to the beneficiary, writing-off such loan effectively amounts to a direct grant by the government. This therefore constitutes an economic advantage.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.\textsuperscript{174} In the case at hand, the decision to write-off a governmental loan must be taken by the authority granting the loan. It is part of the State and its measure is therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.\textsuperscript{175} Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.\textsuperscript{176} For example, as in the case at hand, writing-off a loan and therefore foregoing the sum that was due to be repaid under the loan fulfils the State resources requirement.

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.\textsuperscript{177} In the case at hand, the writing-off is an \textit{ad hoc

\textsuperscript{171} http://www.eps.rs/Documents/JP%20EPS%20izvestaj%202017.pdf
\textsuperscript{172} Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.
\textsuperscript{174} Commission Notice on the notion of State aid (2016/C 262/1) para 39.
\textsuperscript{175} Commission Notice on the notion of State aid (2016/C 262/1) para 51.
\textsuperscript{176} ECJ C-83/98 P, Ladbroke Racing, ECLI:EU:C:2000:248 paras 48-51.
\textsuperscript{177} ECJ C-15/14 P, MOL, ECLI:EU:C:2015:362 para 60.
measure beneficial to JP EPS Belgrade, which has a selective character by reserving favourable treatment for this undertaking.\textsuperscript{178}

(iv) Distortion of competition and effect on trade

JP EPS Belgrade benefiting from this measure is active in the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(d) Governmental loan to JP PEU Resavica

Granting a loan to JP PEU Resavica\textsuperscript{179} potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

The State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.\textsuperscript{180} It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount and under the same conditions.\textsuperscript{181} The assessment whether a private investor would have entered into the transaction on the same terms will vary from case to case and needs to take into account all factors that are relevant to the transaction and its context. This includes the situation of the beneficiary undertaking and the relevant market, the liquidity of the capital, a comparison between the internal rate of return on the investment and the minimum acceptable rate for a private investor. In particular, a loan without an obligation

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.\textsuperscript{182} In the case at hand, the loan is granted by the government and is therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.\textsuperscript{183} Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State

\begin{footnotesize}
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\item\textsuperscript{178} Commission Notice on the notion of State aid (2016/C 262/1) para 126.
\item\textsuperscript{179} http://www.jppeu.rs/dokumenti/izvestaj%20revizora%20%20set%20redovnih%20finansijskih%20izvestaja%20za%202017.%20godinu.pdf; http://www.jppeu.rs/informator.html.
\item\textsuperscript{180} ECJ 67, 68 and 70/85, Van der Kooy [1988] ECR 219, p. 251.
\item\textsuperscript{182} Commission Notice on the notion of State aid (2016/C 262/1) para 39.
\item\textsuperscript{183} Commission Notice on the notion of State aid (2016/C 262/1) para 51.
\end{itemize}
\end{footnotesize}
resources. For example, as in the case at hand, granting a loan on terms that are more favourable than market-terms would fulfill the State resources requirement.

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective. The governmental loan is an *ad hoc* measure benefitting JP PEU Resavica, which has a selective character by reserving favourable treatment for this undertaking.

(iv) Distortion of competition and effect on trade

JP PEU Resavica benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(e) State guarantees

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.\textsuperscript{195} In the same way as any other transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms.\textsuperscript{196} Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter.\textsuperscript{197} This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.\textsuperscript{198}

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.\textsuperscript{199} The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.\textsuperscript{200}

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy.\textsuperscript{201} In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:\textsuperscript{202}

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).

\textsuperscript{196} Commission Notice on the notion of State aid (2016/C 262/1) para 108.
\textsuperscript{197} Commission Notice on the notion of State aid (2016/C 262/1) para 110; Case C-559/12 P, France v Commission, ECLI:EU:C:2014:217, para 96.
\textsuperscript{198} Commission Notice on the notion of State aid (2016/C 262/1) para 109; C-275/10, Residex Capital v Gemeente Rotterdam, ECLI:EU:C:2011:814, para 39.
\textsuperscript{199} Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.
\textsuperscript{200} Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.
\textsuperscript{201} Case C-482/99, France v Commission (Stardust), ECLI:EU:C:2002:294.
\textsuperscript{202} Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 3.1.
A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State. The guarantees at stake are given by the government (i.e. the Ministry of Finance) and are therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of State resources. The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient. Therefore, the guarantees at issue involve State resources.

(iii) Selectivity

When States adopt ad hoc positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.

The guarantees at issue are each granted in favour of one particular TPP, i.e. it guarantees performance and payment of specific obligations of the operator. The operator benefits from the guarantee insofar as it allows it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantees each favour a specific undertaking.

(iv) Distortion of competition and effect on trade

The beneficiaries of these guarantees are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, Ecotrade, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, Bouygues and Bouygues Télécom v Commission and Others, ECLI:EU:C:2013:175, para 137, 138 and 139.
Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, Commission v MOL, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, Deutsche Lufthansa, ECLI:EU:C:2013:442, para 52.
(f) Loan by JP EPS Belgrade to JP PEU Resavica

Granting of a loan by JP EPS Belgrade to JP PEU Resavica\(^{207}\) potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

As pointed out above, the State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.\(^{208}\) It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount and under the same conditions.\(^{209}\)

(ii) Imputability to the State and State resources

The resources of States or of their dependent or independent, national, regional or local public institutions ("public authorities") as well as the resources of undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence ("public undertakings"), are to be seen as State resources.\(^{210}\) The loan is granted by JP EPS Belgrade, a state-owned company. Since the State is capable of directing the use of the company’s resources, they are under the control of the State\(^{211}\) and can be considered State resources.\(^{212}\)

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.\(^{213}\) There is no need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question; the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken.\(^{214}\)

Possible indicators include for example:\(^{215}\)

- The fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;
- The fact that the undertaking through which the aid was granted had to take account of directives issued by governmental bodies;\(^{216}\)
- The integration of the public undertaking into the structures of the public administration;

207 http://www.jppeu.rs/informator.html
214 Commission Notice on the notion of State aid (2016/C 262/1) para 41 et seq.
215 ECJ C-482/99, Stardust, ECLI:EU:C:2002:294 para 55 et seq.
• The degree of supervision that the public authorities exercise over the management of the undertaking;
• Any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

(iii) Selectivity

When States adopt ad hoc positive measures benefiting one or more identified, it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings. 217

In the case at hand, a loan is granted to one company, which has a selective character by reserving favourable treatment for this undertaking.

(iv) Distortion of competition and effect on trade

JP PEU Resavica benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(g) Electricity debt of JP PEU Resavica

JP EPS Belgrade not claiming and enforcing any debts for electricity provided to the JP PEU Resavica 218 potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

As has been pointed out above, not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage. 219

Paying for products delivered and services rendered constitutes charges normally included in the budget of an undertaking. In the case at hand, Resvica is owing remuneration for the electricity provided to it by EPS, but this obligation is not enforced, which in essence constitutes provision of

217 Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, Commission v MOL, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, Deutsche Lufthansa, ECLI:EU:C:2013:442, para 52.

218 http://www.jppeu.rs/dokumenti/Izvestaj%20revizora%20%20set%20redovnih%20finansijskih%20izvestaja%20za%202017.%20godinu.pdf

219 Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.
electricity for free. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

The advantage is granted by JP EPS Belgrade, a state-owned company. Since the State is capable of directing the use of the company’s resources, they are under the control of the State and can be considered State resources.  

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective. There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear, but in the case at hand, the measure benefits Resavica, one coal mine, which has a selective character by reserving favourable treatment for this undertaking.

(iv) Distortion of competition and effect on trade

The coal mine benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

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223 ECJ C-15/14 P, MOL, ECLI:EU:C:2015:362 para 60.
224 Commission Notice on the notion of State aid (2016/C 262/1) para 127.
225 Commission Notice on the notion of State aid (2016/C 262/1) para 126.
F. Ukraine

(a) Direct grants for mining industry

Direct grants from the State’s budget to state coal mines for (i) the restructuring of the coal and peat industry, (ii) rescue measures at coal mining enterprises, (iii) partial compensation of production costs of finished marketable coal, (iv) improving safety measures at mining enterprises, (v) replenishing of current capital or increasing the statutory funds of coal mines to settle the arrears of wages to employees, (vi) construction of mine No. 10 “Novovolynska”, (vii) preventing emergency situations due to flooding of the mines of Pervomaysko-Stakhaiv coal mining region, (viii) payment for Loan Lisichanskgvilya PJSC and the State Development Bank of PRC, and (ix) repairs of TPP potentially constitute State aid and should be scrutinized by the national State aid authority, the Antimonopoly Committee of Ukraine.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention. Direct support of the operational or investment costs of a company without any obligation to pay it back, pay interest or similar would clearly not be provided by the market and therefore constitutes an advantage.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State. The support at stake is given by the Ministry of Energy and Coal Industry and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The measures at stake constitute a direct transfer of resources from the State budget and therefore contains State resources.

226 http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146477
227 http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146478
228 http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146479
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232 http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146484
233 http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146485
234 http://www.centrenergo.com/ru/shareholders/reports/
(iii) Selectivity

When States adopt ad hoc positive measures benefiting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.\(^{237}\)

In the case at hand, support is granted to specific projects only and is therefore selective.

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.\(^{238}\) A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.\(^{239}\) The beneficiaries are active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.\(^{240}\) Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.\(^{241}\) As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Failure to collect tax, social security contribution and VAT arrears

The failure by Ukraine to collect tax, social security contribution arrears and VAT\(^{242}\) from state coal mines\(^{243}\) and Centrenergo\(^{244}\) potentially constitutes State aid and should be scrutinized by the national State aid authority, the Antimonopoly Committee of Ukraine.

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\(^{237}\) Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, Commission v MOL, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, Deutsche Lutfhansa, ECLI:EU:C:2013:442, para 52.


\(^{240}\) Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, Eventech v The Parking Adjudicator, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, Libert and others, ECLI:EU:C:2013:288, para 76.

\(^{241}\) ECJ C-518/13, Eventech, ECLI:EU:C:2015:9, para 65.

\(^{242}\) http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64598

\(^{243}\) http://sfs.gov.ua/dovidniki--reestri--perelik/pereliki--296361.html

\(^{244}\) http://sfs.gov.ua/dovidniki--reestri--perelik/pereliki--296361.html
(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage. This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.

Tax, social security contribution and VAT constitute charges normally included in the budget of an undertaking. In fact, in this case, state coal mines and Centrenergo may be required to pay these charges, but the obligation is not enforced and, therefore, it is released from the duty to pay the arrears. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State. In the case at hand, the decision not to collect the arrears must be taken by the authority responsible for the collection which is the tax administration. It is part of the State’s administration and its measures are therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources. For example, as in the case at hand, a ‘shortfall’ in tax, social security contributions and VAT due granted by the State fulfils the State resources requirement.

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective. There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear, but in the case at hand, the exemption is an ad hoc measure benefitting state coal mines and Centrenergo, which has a selective character by reserving favourable treatment for these undertakings. The exemption from VAT applies to TPPs and therefore favours TPPs compared to other electricity generators.

245 Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.
251 ECJ C-15/14 P, MOL, ECLI:EU:C:2015:362 para 60.
252 Commission Notice on the notion of State aid (2016/C 262/1) para 127.
253 Commission Notice on the notion of State aid (2016/C 262/1) para 126.
(iv) Distortion of competition and effect on trade

State coal mines benefitting from this measure is active in the exploration and provision of coal for the generation of electricity; Centrenergo and TPPs are generating electricity, markets which are open to competition

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.